IN THE SUPREME COURT OF MISSOURI

STATE *ex rel.* DEBRA HOWENSTINE, M.D.,	)	
Relator,	)	
v.	)	No. SC85998
THE HONORABLE ELLEN S. ROPER, Judge of the Circuit Court of Boone County, Missouri,	)	
Respondent.	)	

ORIGINAL PROCEEDING ON PETITION FOR WRIT OF PROHIBITION

RELATOR'S REPLY BRIEF

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I. Prohibition is the proper remedy for the Trial Court's denial of Dr. Howenstine's summary judgment motion asserting her immunity from tort.

The issue before this Court is simply whether the medical director of a local public health department providing population-based health services on behalf of the State of Missouri is immune from suit as a matter of law under the public duty or official immunity doctrines where the negligence alleged against her involves her duties as the medical director and not any medical care she provided Paul Muren. Though Dr. Howenstine remains the only defendant in the underlying lawsuit, plaintiffs argue that prohibition is not an appropriate remedy to consider whether Dr. Howenstine has a complete defense which would bar plaintiffs' claims of negligence.

As this Court has recognized in a case cited by plaintiffs, "a writ of prohibition after the denial of summary judgment is proper if it will prevent unnecessary, inconvenient and expensive litigation." *State ex rel. Springfield Underground, Inc. v. Sweeney*, 102 S.W.3d 7, 8-9 (Mo. *banc* 2003) (Brief on Behalf of Respondent at 20). It cannot be denied that if Dr. Howenstine is entitled to immunity under either the public duty or official immunity doctrines as a matter of law, "unnecessary, inconvenient and expensive litigation" will be forestalled by this Court's order making permanent its writ.

Consequently, plaintiffs' assertion that this case should be tried because it does not involve a statute of limitations or *res judicata* defense simply ignores the fact that Missouri appellate courts—including this Court—have considered in prohibition proceedings the applicability of the public duty and official immunity doctrines to various

public officials and employees. *See, e.g., State ex rel. Barthelette v. Sanders*, 756 S.W.2d 536 (Mo. *banc* 1988); *State ex rel. Twiehaus v. Adolf*, 706 S.W.2d 443 (Mo. *banc* 1986); *State ex rel. Missouri Dep't of Agriculture v. McHenry*, 687 S.W.2d 178 (Mo. *banc* 1985); *State ex rel. St. Louis Hosp. v. Dowd*, 908 S.W.2d 738 (Mo. App. E.D. 1995); *State ex rel. Boshers v. Dotson*, 879 S.W.2d 730 (Mo. App. S.D. 1994); *State ex rel. Southers v. Stuckey*, 867 S.W.2d 579 (Mo. App. W.D. 1993); *State ex rel. Eli Lilly & Co. v. Gaertner*, 619 S.W.2d 761 (Mo. App. E.D. 1981). Plaintiffs offer no rationale for treating differently Dr. Howenstine's claim that she is immune from suit as a matter of law.

In another attempt to prevent this Court from deciding whether Dr. Howenstine is entitled to immunity, plaintiffs assert that prohibition is inappropriate because there are facts "in dispute" regarding Dr. Howenstine's status as a "public official." According to plaintiffs, these "disputed facts" include Dr. Howenstine's

> status as a public official, whether the acts which form the basis of Plaintiffs' claims against her are "discretionary" within the legal definition of the phrase; and certainly whether or not Howenstine has complied with her duty to "ensure" that her collaborating nurses possessed the requisite skill, education, training and competence, to provide medical care to tuberculosis patients . . . .

Brief on Behalf of Respondent at 21-22 (emphasis in original). These are not disputed facts, of course. Except for the last issue of whether Dr. Howenstine "complied with"

alleged duty to "ensure" the public health nurses were properly trained,[1] these are the very legal issues to be resolved by this Court. In fact, plaintiffs do not point to a single disputed fact material to the issue of immunity.

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[1] For purposes of deciding whether Dr. Howenstine is entitled to immunity under the official immunity or public duty doctrines, there is no need to resolve whether Dr. Howenstine "complied with" this alleged duty. If Dr. Howenstine is entitled to official immunity or the protection of the public duty doctrine, the issue of whether she was negligent is moot as it is this very conduct for which she is immune. *State ex rel. Twiehaus*, 706 S.W.2d at 444 (citing *Kanagawa v. State*, 685 S.W.2d 831, 835 (Mo. *banc* 1985).

For this reason, disputed facts relating to the nurse's negligence need not be resolved for purposes of this appeal. For example, plaintiffs allege as an undisputed fact throughout the statement of facts and argument portions of their brief that the public health nurses continued to provide INH to Paul Muren even though he demonstrated symptoms of an adverse reaction to the drug. Brief on Behalf of Respondent at 14, 17, 18, 25, 29, 42. Whether Muren was suffering an adverse reaction at the time of his visits is a disputed ultimate fact; however, the fact that Muren reported he was tired in April 2000 before he started the medication, was "sometimes" tired in May 2000, had no complaints in June 2000, and was "tired" and had dark yellow urine "on and off" in August 2000 is undisputed. *See* Exh. 13 in Appendix to Relator's Brief at A79-A83. Resolution

Writ should issue where the trial court wrongly decides a matter of law where the material facts are uncontested, and thus deprives a party of an absolute defense. *State ex rel. Police Retirement Sys. of St. Louis v. Mummert*, 875 S.W.2d 553, 555-56 (Mo. *banc* 1994). Because the facts material to these issues are undisputed and Dr. Howenstine is entitled to assert the absolute defense of immunity as a matter of law, prohibition is the proper remedy for the trial court's refusal to grant her summary judgment on that issue.

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of this ultimate fact is not material to the question of whether Dr. Howenstine is immune from damages related to her own alleged negligence.

II. As Medical Director for the Columbia/Boone County Health Department, Relator is entitled to official immunity because she is a public official and the nature of her alleged negligence concerns discretionary conduct performed in carrying out her role in safeguarding public health.

A. Dr. Howenstine is a public official for purposes of official immunity.

In their effort to preclude the application of the official immunity doctrine to Dr. Howenstine, plaintiffs rely upon a line of cases which address whether an individual is a public officer under the Missouri Constitution instead of analyzing Dr. Howenstine's status as a public official in the context of Missouri cases in which immunity is actually at issue. In addition, plaintiffs argue that an explicit and literal delegation of duties from the State to Dr. Howenstine must exist before she is entitled to claim the protection of official immunity. Neither argument is supported by Missouri law.

Ignoring the relevant law found in cases such as *Green v. Denison*, 738 S.W.2d 861 (Mo. *banc* 1987), plaintiffs instead argue that Dr. Howenstine is not a public official based on case law wholly unrelated to the immunity defense. Indeed, none of the three cases relied upon by plaintiffs analyze whether a defendant is a public official for purposes of immunity; rather, all three analyze whether a defendant is a public officer for purposes of compliance with the Missouri Constitution. *See State ex rel. Pickett v. Truman*, 64 S.W.2d 105 (Mo. *banc* 1933) (analyzing whether an attorney appointed to collect back taxes was a state officer for purposes of administering an oath of office); *State ex rel. Scobee v. Meriwether*, 200 S.W.2d 340 (Mo. *banc* 1947) (analyzing whether a court reporter was a state officer for purposes of applying the Constitutional mandate

prohibiting a salary increase while in office); and *Kirby v. Nolte*, 164 S.W.2d 1 (Mo. *banc* 1942) (analyzing whether a director of personnel was a public officer for purposes of the residency requirement found in the Constitution).

In reliance on these cases, plaintiffs maintain that Dr. Howenstine is not a public official for purposes of immunity because she is not an elected official. While it is true that Dr. Howenstine is not an elected official, this Court has held that official immunity is not limited to high-level or elected officials. *Green*, 738 S.W.2d at 865. Election to public office is certainly not a requirement.

According to plaintiffs, another barrier to the application of official immunity in this case is the claim that Dr. Howenstine is not an employee of the State of Missouri, the Department of Health, Boone County, the City of Columbia, or the health department. Despite the fact that Dr. Howenstine, by virtue of her employment by a public institution, is a public employee and the fact that the City of Columbia reimburses the University for Dr. Howenstine's salary, this argument assumes, without case support, that the application of official immunity requires her direct employment by the Missouri Department of Health or the Columbia/Boone County Health Department.

This hypertechnical argument seeks to limit analysis of whether Dr. Howenstine is exercising the sovereign's power as Medical Director of the health department to the signature on her paycheck rather than the substance of her duties. Even in the cases relied upon by plaintiffs, the key issue in analyzing whether a person was a public officer focused on the substance of their duties. *See, e.g.*, *State ex rel. Pickett,* 64 S.W.2d at 106 ("It is the duty of his office and the nature of that duty that makes one an officer and not

the extent of the authority although designation by the law has some significance.") (citations omitted).

While plaintiffs attempt to distinguish *Benjamin v. University Internal Med. Found*., 492 S.E.2d 651 (Va. 1997), on other grounds, they do not attack the proposition for which it was cited: the fact that a defendant physician's salary was paid to her by her university employer even though the actual source of these funds was the state did not remove her from the shield of immunity. *Id.* at 652-53. Consequently, the fact that Dr. Howenstine is not a direct employee of the health department or the Missouri Department of Health should not divert this Court from the more important examination of the nature of the duties she performs in safeguarding public health.

In an effort to equate Dr. Howenstine with the physician-defendants in *State ex rel. Eli Lilly & Co.*, 619 S.W.2d 761, so that Dr. Howenstine is deprived of official immunity, plaintiffs equate Dr. Howenstine's duties as Medical Director to those routinely performed by physicians in the private setting. The comparison is inapposite. In *Eli Lilly*, the physician-defendants were sued for the negligent medical care they directly rendered a patient—a situation which Relator has acknowledged in her brief would expose a physician-defendant to liability. Relator's Brief at 40. In contrast, Dr. Howenstine is not sued for providing negligent medical care to Paul Muren, but is instead charged with an alleged failure to train and supervise public health nurses in their delivery of population-based health services.

Plaintiffs try to circumvent this distinction by arguing that Dr. Howenstine's duties, such as entering into collaborative practice agreements with the public health

nurses, are merely contractual in nature and routinely performed by licensed physicians in private settings. The essence of plaintiffs' argument is that this conduct cannot constitute the exercise of a sovereign power of the state or the essence of governing if it is conduct not explicitly mandated by statute and is performed by those outside the public realm.

This argument is fallacious for three reasons. First, plaintiffs have not denied that each local health department in Missouri is mandated to have a physician Asign off@ on standing orders (in this case, the Columbia/Boone County Health Department Policies and Protocols Manual) for nurses delivering population-based services (Writ Pet. & Ans. at ¶ 35); accordingly, Dr. Howenstine, as Medical Director of the Health Department, was required by the Missouri Department of Health to enter into a collaborative practice arrangement with the public health nurses.

Second, cases subsequent to *Eli Lilly* have broadened the application of the official immunity doctrine to actors whose duties were not explicitly enumerated by a particular statute; though many of these cases are cited by Relator (Relator's Brief at 36-37), Respondent has offered no reason why the holdings of these cases should be ignored.

Third, these same cases also demonstrate that it is not whether the particular conduct is the type performed by those in a private setting; instead, determinative for the application of official immunity is the purpose for which the conduct is being performed. How else could a computer programmer and data processing coordinator, a director of nursing, or a design engineer—the alleged negligence of each involving conduct also performed by those in private settings—be entitled to official immunity?

When analyzed in the context of cases which address the status of a defendant as a public official for purposes of applying official immunity, there is no question that Dr. Howenstine is a public official.

B. That Dr. Howenstine is in collaborative practice with the public health nurses for the purpose of delivering population-based health services does not remove the protection of official immunity because her alleged negligence does not involve her own medical treatment, but her negligence in carrying out duties as Medical Director required to safeguard public health.

Not disputing that the alleged failure of Dr. Howenstine to train and supervise the public health nurses involves discretionary conduct, plaintiffs strive to avoid the application of official immunity by contending that this conduct does not go to the "essence of governing"—despite the cases cited by Relator holding that the alleged failure to train and supervise is conduct protected by official immunity. *See* Relator's Brief at 41, 48 (*citing Kanagawa*, 685 S.W.2d 831; *State ex rel. Southers*, 867 S.W.2d 579; *Bates v. State*, 664 S.W.2d 563 (Mo. App. E.D. 1983); *Brummitt v. Springer*, 918 S.W.2d 909 (Mo. App. S.D. 1996)).

In part an implicit acknowledgment that they can find no other source for such a duty and in part an explicit attempt to void the applicability of the above-referenced cases, plaintiffs assert that Dr. Howenstine's duty to train and supervise the public health nurses arises from the regulations governing "Methods of Treatment" in collaborative practice—more particularly, 4 C.S.R. 200-4.200(3)(B). As such, plaintiffs' argument

goes, the failure of Dr. Howenstine to train and supervise the public health nurses with whom she was in a collaborative practice arrangement constitutes literal medical malpractice by Dr. Howenstine rather than a breach of her official duties as Medical Director of the health department.

The entire position of the plaintiffs relies entirely on three faulty propositions: (1) that 4 C.S.R. 200-4.200(3)(B) applies to a physician in a public health setting in which population-based services (such as tuberculosis control) are delivered, (2) that 4 C.S.R. 200-4.200(3)(B) imposes on a physician a duty to train and supervise a collaborating nurse to "ensure" her non-negligent performance of delegated acts, and (3) that negligent conduct by a nurse in a collaborative practice arrangement necessarily implies the negligence of the collaborating physician's practice of medicine. There is no support for any one of these propositions.

1. Dr. Howenstine does not have a regulatory duty to train and supervise the public health nurses to "ensure" their competence in providing tuberculosis control services to the public.

It is not simply Dr. Howenstine's own denials, nor is it the Missouri Department of Health's Public Health Nurse Manual's language cited by Dr. Howenstine that provides support for the contention that the "Methods of Treatment" section [4 C.S.R. 200-4.200(3)] does not apply in this case. Despite their knowledge of its existence, plaintiffs do not mention one single time on any of the 46 pages of their brief the most relevant section of the collaborative practice regulations—4 C.S.R. 200-4.200(5). That section provides:

(5) Population-Based Public Health Services.

(A) In the case of the collaborating physicians and collaborating registered professional nurses practicing in association with public health clinics that provide population-based health services limited to . . . tuberculosis control . . ., the geographic areas, methods of treatment and review of services shall occur as set forth in the collaborative practice arrangement. If the services provided in such settings include the diagnosis and treatment of disease or injury not related to population-based health services, then the provisions of sections (2), (3), and (4) above shall apply.

4 C.S.R. 200-4.200(5) (emphasis added) (Appendix to Relator's Brief at A70). This authority is the proverbial elephant in the room plaintiffs want to ignore.

This exclusion represents the reality that delivery of population-based health services by public health nurses had occurred for years prior to the adoption of the collaborative practice law. These services had been provided (and, in a few locations, are still provided) by public health nurses in local health departments pursuant to standing orders signed by the State health department's epidemiologist. Accordingly, the regulations adopted to implement the collaborative practice law distinguished between those arrangements necessary to provide population-based services and those related to the provision of primary care services.

The distinction is evidenced by comparison of the collaborative practice agreement between Dr. Howenstine and the public health nurses providing tuberculosis control (Appendix to Relator's Brief at A60-A69) with the collaborative practice

agreement between Dr. Howenstine and Martin, an advanced nurse practitioner (Appendix to Relator's Brief at A73-A74). Plaintiffs do not offer a single reason why this section of the collaborative practice regulations does not mean what it plainly says.

Possibly anticipating this concern, plaintiffs cast their nets wide to seek other authority for their proposition that Dr. Howenstine had a duty to train and supervise the public health nurses in their day-to-day delivery of tuberculosis control services, plaintiffs point to six lines of deposition testimony of Mary Martin, the Public Health Manager, and to one page of testimony by Dr. Colleen Kivlahan, Dr. Howenstine's retained expert. Brief on Behalf of Respondent at 34. Out of its context, Martin's statement is nothing more than a general assertion that the nurses were "supervised" by herself, the Public Health Nursing Supervisor, and Dr. Howenstine. In the context of Martin's deposition, however, it is clear that Dr. Howenstine's "supervision" was the general oversight responsibility she had with regard to the general medical direction of the health department. *See* Martin Depo. I at 8:7-19 (Exh. 6 to Writ. Pet., Vol. II at 009).

Likewise, the intent of Dr. Kivlahan's testimony is equally clear in the two pages following the portion quoted by plaintiffs—Dr. Howenstine was not responsible for the "hiring, firing, training, daily supervision of any nurse" at the health department. *See* Kivlahan Depo. III at 71:3-7 (Exh. 12 to Writ Pet., Vol. IV at 324). Moreover, Dr. Kivlahan explicitly testified that the Methods of Treatment section of the collaborative practice regulations, relied upon by plaintiffs, was not applicable to the collaborative practice arrangement between Dr. Howenstine and the registered nurses at the health

department. *See* Kivlahan Depo. II at 239:11-242:21; 254:9-259:12 (Exh. 12 to Writ Pet., Vol. IV at 286-87, 290-91).

Without the mandate of this regulation to "ensure" the competence of public health nurses, plaintiffs warn of the erosion of health care delivery which would be inconsistent with the Missouri Department of Health's duty to safeguard public health. By requiring collaborating physicians in the 114 Missouri counties who provide oversight to their local health departments to individually train and supervise the day-to-day activities of public health nurses delivering population-based health care to Missouri's citizens so as to hopefully avoid liability for the nurses' negligence, an erosion of the quality of healthcare can only be expected. As a result of this Herculean task, the delivery of population-based health care services to the public will be performed by public health nurses pursuant to standing orders bearing a Jefferson City postmark.

2. Even if the regulatory language found in 4 C.S.R. 200-4.200(3)(B) applied in this case, it does not impose a duty upon Dr. Howenstine to train and supervise the registered nurses at the health department.

By twisting the language of 4 C.S.R. 200-4.200(3)(B), plaintiffs obligate Dr. Howenstine to "ensure" that the public health nurses who provided tuberculosis control treatment pursuant to the Columbia/Boone County Policies and Protocol Manual had the "requisite skill, education, training and competence" to complete the delegated tasks. Brief on Behalf of Respondent at 34. Even if this section applied to the delivery of

population-based health care, this is not what the regulation would actually have required of Dr. Howenstine.

Subsection "B" of the Methods of Treatment section of the collaborative practice regulations provides:

> The collaborating physician shall consider the level of skill, education, training and competence of the collaborating registered professional nurse or advanced practice nurse and ensure that the delegated responsibilities contained in the collaborative practice arrangement are consistent with that level of skill, education, training, and competence.

4 C.S.R. § 200-4.200(3)(B) (Appendix to Relator's Brief at A70). The syntax of the regulation rebuts plaintiffs' claim.

Simply, this regulation requires the collaborating physician to do two things: (1) "consider" the collaborating nurse's skill, education, training and competence, and (2) "ensure" that the responsibilities she has delegated to those nurses are "consistent with" the nurse's skill, education, training, and competence. The regulation does not require that the collaborating physician "ensure" a nurse's competence.

Assuming *arguendo* the application of this regulation, Dr. Howenstine's duty would be to "consider" the fact that each of the public health nurses at the Health Department was registered with the State of Missouri, had several years of nursing experience prior to coming to the health department, and had worked in public health for several years prior to April 2000. Then, Dr. Howenstine would need to "ensure" that the medical acts delegated to these nurses (identified in the agreement as the "placement of

PPDs, collection of sputum and blood specimens, ordering chest x-rays, and dispensing tuberculosis medications") were consistent with the nurses' education, skills and training—all the while aware of the fact that the health department had a system in place for the training and day-to-day supervision of these nurses. *See* Relator's Brief at 14-17.

Though this regulation, even if applicable, does not impose upon Dr. Howenstine a duty to train and supervise the nurses, it would require from her the exercise of discretionary judgment—the very conduct protected by the official immunity doctrine.

3. Negligent conduct by a public health nurse in delivering population-based health services does not constitute medical malpractice by Dr. Howenstine.

Claiming that Dr. Howenstine's alleged failure to train and supervise the nurses is not conduct protected by official immunity, plaintiffs maintain that negligence by the public health nurses in failing to diagnose the alleged adverse reaction Paul Muren reported on three visits to the health department constitutes medical malpractice by Dr. Howenstine because the collaborative practice arrangement allowed her to expand her medical practice. In other words, Dr. Howenstine is negligent in the same way she would be if she were present in the examining room and personally failed to diagnose Paul Muren's alleged adverse reactions, despite the fact that there is no dispute that she was unaware that Paul Muren was receiving treatment at the health department until after he had been taken off the anti-tuberculosis drug. This argument is nothing more than fanciful sophistry.

While collaborative practice does allow the expanded practice of particular medical acts by nurses, the questions that must be answered are whose practice is expanded and for what purpose? Plaintiffs imply that because Dr. Howenstine expanded her ability to practice medicine by entering collaborative practice arrangements for some implied personal benefit, she should bear the responsibility for the negligence of the public health nurses who were acting in her stead. This was not the circumstance, however. In fact, Dr. Howenstine was acting in the stead of the state health department's epidemiologist by entering into a collaborative practice arrangement for the delivery of population-based services for the purpose of carrying out the state's statutory duty to safeguard public health. Such conduct involves the "essence of governing."

Prior to the adoption of the Collaborative Practice Act in 1996, Missouri's Department of Health promulgated protocols under which local health department nurses were authorized to assess and provide medication to individuals with latent tuberculosis infection. Writ Pet. & Ans. at ¶ 38; Exh. 12 to Writ Pet., Vol. IV 179, 181. With regard to the actual prescription of anti-tubercular medication, the state epidemiologist would issue a "standing order" which stipulated the process by which medication could be administered to these patients; in more populous areas such as Columbia, a local physician would sign off on prescriptions pursuant to a contract with the State. *Id.* Currently, the Department of Health mandates that each local health department have an arrangement with a physician for the purposes of "signing off" on standing orders guiding the delivery of population-based services. *See* Writ Pet. & Ans. at ¶ 35. Consequently, the practice expanded is that of the Missouri Department of Health.

Pointing to language in the contract between the City of Columbia and the Missouri Department of Health which prevents the contractee from obligating the State financially, plaintiffs argue that there is no basis for the conclusion that the Columbia/Boone County Health Department is an "extension" of the Missouri Department of Health when it delivers population-based services to the public. Despite the fact that the actual words "tuberculosis control" do not appear in the contract between the City of Columbia and the State of Missouri, plaintiffs do not dispute that tuberculosis control, a population-based health service, is funded by state and local public funding or that the State monitors the delivery of that service. *See* Ans. to Writ Pet. at ¶¶ 13, 14.

Furthermore, the contract itself speaks of the health department's obligation, on behalf of the state health department, to "develop and apply policies dealing with communicable disease" and to "respond to any environmental, health, communicable disease" emergency. Exh. 6 to Writ Pet., Vol. II at 098, 101.

Another oft-repeated assumption underlying plaintiffs' argument that the nurses' negligence constitutes Dr. Howenstine's own malpractice is equally false—the allegation that Dr. Howenstine somehow delegated to the nurses the medical act of diagnosing an adverse reaction to INH. Brief on Behalf of Respondent at 6, 12, 25, 29, 42. In addition to the fact that the protocol governing the delivery of tuberculosis control services does not contain a delegation of Dr. Howenstine's ability to make a medical diagnosis (Appendix to Relator's Brief at A69), plaintiffs offer no response to the authority cited in Relator's Brief that registered nurses in Missouri are independently authorized by statute to conduct a nursing assessment and make a nursing diagnosis, including the ability to

monitor for signs and symptoms of an adverse reaction to INH. Relator's Brief at 45-47. Accordingly, the negligence alleged against the nurses does not implicate the "expanded practice" of Dr. Howenstine because no collaborative practice arrangement is required for a nurse to perform these acts.

Moreover, assuming plaintiffs' argument that the "Methods of Treatment" section applies to the delivery of population-based health services, Dr. Howenstine would be prohibited from delegating such an act to the nurses: "Nothing in these rules shall be construed to permit medical diagnosis of any condition by a registered professional nurse pursuant to a collaborative practice arrangement." 4 C.S.R. 200-4.200(3)(K). Consequently, no matter how many times the allegation is repeated, Dr. Howenstine did not delegate her ability to make a medical diagnosis to the public health nurses, nor did she need to do so.

Demonstrating the distinction between a physician's personal liability for medical malpractice and her immunity from tort for conduct performed on behalf of the public and unrelated to any medical care she may personally provide is the case of *Howard v. City of Columbus*, 521 S.E.2d 51 (Ga. App. 1999) (Appendix to Relator's Brief at Exh. 14). In *Howard*, the court held that the defendant physician was immune from suit in his role as medical director for the jail and could not be liable for negligent supervision or training of the medical staff at the jail or its policies because he was performing those duties in the course of his public employment. 521 S.E.2d at 415. The physician in *Howard*, however, was also serving as the on-call physician, and he failed to come to the jail to examine a seriously ill diabetic prisoner or order that he be sent to a hospital after a

nurse called and spoke with him about the prisoner's condition; as a result, he was not immune for this act of negligence. *Id.*

Plaintiffs are silent in their response to this authority; indeed, there is no logical reason why Dr. Howenstine, as medical director for the health department, would not be immune from damages for her alleged negligent supervision or training of the public health nurses. This is true under the analysis of the *Howard* case and consistent with Missouri precedent regarding the immunity of public officials for negligence related to allegations that they failed to follow a specific duty to train and supervise subordinates. See, e.g., *Kanagawa*, 685 S.W.2d 831 (claim that prison officials failed to Aadequately supervise their employees and insure that the prisoners were supervised@ was discretionary function protected by official immunity); *State ex rel. Southers*, 867 S.W.2d 579 (juvenile home administrator=s failure to Amake adequate provision to ensure that the staff were trained in security measures@ was discretionary function protected by official immunity); *Bates*, 664 S.W.2d 563 (developmental disability treatment center superintendent=s failure to Aproperly screen employees hired@ and failure Ato supervise@ the center=s employees were discretionary functions protected by official immunity).

Because Relator Dr. Howenstine is a public official and the charged negligence relates to the discretionary performance of her official duties as Medical Director of the Columbia/Boone County Health Department, she is entitled to official immunity in the underlying lawsuit.

III. Because Dr. Howenstine, as Medical Director of the health department, did not have a special duty to Paul Muren but a duty to the general public, she is immune from liability in the underlying lawsuit as a matter of law under the public duty doctrine.

Other than reasserting their previous argument that Dr. Howenstine is not a public official for purposes of application of the public duty doctrine, plaintiffs' only other rebuttal to the assertion by Dr. Howenstine of the protection afforded her by the public duty doctrine is that Dr. Howenstine owed a special duty to Muren because the public health nurses' duty to treat Muren in a non-negligent fashion was actually a duty the nurses performed on behalf of Dr. Howenstine. With little variation, these are the same arguments asserted by plaintiffs against the application of official immunity. While these arguments gain in familiarity by their repetition, the force of the arguments does not increase.

First, the analysis of whether a defendant is a public official for purposes of the public duty doctrine is best left to cases which address the issue of immunity and not cases conducting this analysis for other purposes. This point is even more compelling given that the focus for determining the applicability of the public duty doctrine is on the particular duty which is alleged to be negligent rather than the particular characteristics of the defendant's "public office." *See, e.g., Brown v. Tate*, 888 S.W.2d 413, 416 (Mo. App. W.D. 1994) ("It may be that the public duty doctrine will furnish protection to a public employee who is not a public official in a case were the official immunity doctrine

would not."). For this reason, Dr. Howenstine's status as a public official is even stronger under the public duty doctrine.

Second, plaintiffs seek to superimpose a physician-patient relationship between Dr. Howenstine and Paul Muren by virtue of her collaborative practice arrangement with the public health nurses; however, this effort fails. Dr. Howenstine had no physician-patient relationship with Muren during the time he alleges negligence; in fact, she did not become aware that Muren was receiving tuberculosis control services from Columbia/Boone County Health Department until after he suffered an adverse reaction to the INH and had been instructed to stop taking the drug. With these facts in mind, Dr. Howenstine agrees with plaintiffs that "a physician in public employment owes the normal physician-patient duties to those he examines and treats." Brief on Behalf of Relator at 40, *citing Green*, 738 S.W.2d at 866 (emphasis added).

Plaintiffs seek to extend this rationale to impose liability on Dr. Howenstine by alleging she had a special duty to those patients who receive treatment by the public health nurses, regardless of her own personal knowledge of the patient or his condition, because it is Dr. Howenstine's regulatory duty to "ensure" the nurses are non-negligent in their treatment. Plaintiffs' hyperbole cannot form the basis of a physician's liability.

In addition to the obvious response that there is no regulatory requirement that Dr. Howenstine ensure non-negligence by training and supervising the nurses, any duty Dr. Howenstine, as Medical Director of the health department, would have to follow the collaborative practice regulation—were it applicable—would be a duty she owed to the general public and not to Paul Muren. This is true even where the harm to a particular

class (such as those receiving anti-tuberculosis medication) is foreseeable as a result of noncompliance with a regulatory duty. *See, e.g., Jamierson v. Dale*, 670 S.W.2d 195, 196-97 (Mo. App. W.D. 1984) (affirming summary judgment in favor of Division of Family Services employee responsible for inspection of licensed day care center for compliance with licensing regulations because regulations created duty to public and not to discrete class of children attending day cares); *State ex rel. Southers*, 867 S.W.2d 579 (affirming residential youth facility administrator's dismissal from suit under public duty doctrine even though state regulation directed administrator to "immediately" notify local police of runaway youth because duty ran in favor of state and did not create a private right of action for specific member of public).

Why—even where harm is foreseeable to a discrete class as a result of noncompliance with a regulatory duty—is a public official or employee immune from liability? The cases discussed by plaintiffs provide the answer: the public duty doctrine provides immunity for public officials or employees as long as they are carrying out a duty owed to the general public. *See, e.g., Brown*, 888 S.W.2d 413 (no immunity where the officer violated his duty to obey traffic rules and regulations "in a non-emergency situation"); *Green*, 738 S.W.2d 861 (officer was immune for bystander's injuries caused by a police officer's gunfire into building where the officer was engaged in his official duties at the time).

During the time Muren received tuberculosis control services from the Public Health Nurses at the health department, Dr. Howenstine's duty to oversee the medical direction of the health department, her duty to adopt appropriate protocols for the

population-based service of tuberculosis control, and her duty to enter collaborative practice arrangements with the public health nurses were duties she owed to the public—not to Paul Muren. Even if it were Dr. Howenstine's responsibility to train and supervise the Public Health Nurses (which it was not), this, too, constituted a duty to the general public and to the State of Missouri and not to Paul Muren or even to a discrete class of Missouri citizens with latent tuberculosis infections. Consequently, Dr. Howenstine is immune from suit under the public duty doctrine.

CONCLUSION

Because Relator, as Medical Director for the Columbia/Boone County Health Department, is entitled as a matter of law to immunity from the underlying lawsuit due to the protection afforded her by the official immunity and public duty doctrines, this Court should make its preliminary writ absolute and prohibit Respondent from taking any further action other than granting summary judgment to Relator Debra Howenstine, M.D.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that I caused a copy of the foregoing and a copy of the disk required by Rule 84.06(g) to be served upon each of the parties by first-class U.S. mail, postage prepaid, this 4th day of October, 2004, as indicated below:

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06

I hereby certify that the foregoing Relator's Reply Brief complies with all requirements of Supreme Court Rule 84.06 in that:

1. Relator's Reply Brief, formatted in Microsoft Word, complies with the limitations contained in Rule 84.06(b), in that the number of words in this Relator's Brief that are counted against the 7,750 word limit is 6,586, according to the word count of the word-processing system used to prepare this brief; and

2. that, as required by Rule 84.06(g), the IBM-PC-compatible 1.44 MB, 3 **2** - inch floppy disk containing this brief and filed herewith has been scanned for viruses and is virus-free.

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